

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1624-CR

Cir. Ct. No. 2011CF1302

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEREMY G. LAVENDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Jeremy G. Lavender appeals from an amended judgment of conviction for one count of stalking, contrary to WIS. STAT.

§ 940.32(2) (2011-12).¹ He also appeals from an order denying his postconviction motion for resentencing. Lavender argues that he is entitled to a new sentencing hearing because the trial court failed to adequately explain the sentence it imposed. We disagree and affirm.

BACKGROUND

¶2 Lavender was charged with one count of stalking, domestic abuse, and one count of violating a domestic abuse injunction. According to the criminal complaint, after he and his girlfriend broke up, Lavender continued to try to contact her by sending text messages and calling her on the telephone. Over a period of about two months, the messages became threatening.

¶3 Lavender's ex-girlfriend obtained a domestic abuse injunction against him on March 15, 2011; Lavender was served with a copy of the injunction in court. Nonetheless, he sent her 188 text messages between March 15 and March 19, 2011; gained access to her cell phone password and changed her voicemail message to a vulgarity; posted a sexually explicit video of her on the internet and sent her a profanity-laden message about it; and engaged in a variety of other harassing and threatening behavior.

¶4 On March 21, 2011, Lavender's ex-girlfriend arrived home to find Lavender climbing a ladder to her balcony. She called the police and they took Lavender into custody.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶5 Pursuant to a plea agreement, Lavender agreed to plead guilty to one count of stalking and the State dismissed the count of violating a domestic abuse injunction. The State agreed to recommend an unspecified period of incarceration followed by a period of supervision, and Lavender was free to argue. The maximum potential sentence was eighteen months of initial confinement and two years of extended supervision. *See* WIS. STAT. §§ 940.32(2), 939.50(3)(i), and 973.01(2)(b)9. The trial court accepted Lavender’s plea and found him guilty.²

¶6 At sentencing, the State provided additional details of Lavender’s stalking, including the fact that he: threatened to beat his ex-girlfriend; created false Facebook accounts for his ex-girlfriend that he used to harass his ex-girlfriend’s new boyfriend; placed telephone calls to his ex-girlfriend that purported to be from her new boyfriend, and ransacked her home. The State also noted that Lavender’s criminal history included two counts of theft of movable property, one count of retail theft, and one count of possession of THC. Consistent with the plea agreement, the State asked the trial court to impose a period of initial confinement followed by a period of extended supervision.

¶7 Lavender’s trial counsel argued that Lavender should be sentenced to time served, which was 158 days. In the alternative, trial counsel suggested that the trial court place Lavender on probation and impose and stay jail time as a condition of probation. Trial counsel argued that Lavender had “learned his lesson” and “never, ever, ever, ever again intends to have contact with” his ex-girlfriend.

² The Honorable Mary Kuhnmuensch accepted Lavender’s plea and found him guilty. The case was then transferred due to judicial rotation and the Honorable Mel Flanagan sentenced Lavender and denied his postconviction motion.

¶8 The trial court began its sentencing remarks by considering Lavender's character and criminal history, noting that Lavender had prior convictions and "ongoing issues with drugs and alcohol." It gave Lavender credit for pleading guilty and for attending four weeks of "dual diagnosis" group meetings for those with substance abuse and mental health issues. The trial court also discussed Lavender's stalking, stating that Lavender had "put a lot of people through virtual hell for months and months and months" and simply refused to stop his activities, even though many people asked him to stop. The trial court noted that Lavender "could have been charged with many, many other crimes" as a result of his actions over a three-month period. The trial court also commented on the fact that when Lavender was on probation for his crimes in the past, he "had the opportunity for some treatment ... but ... didn't successfully complete it." The trial court said that while Lavender was in the community, he did not have his alcohol consumption "under control."

¶9 The trial court said "based on all these facts and circumstances ... a time-served disposition is totally unacceptable [because] ... [i]t depreciates the severity and intensity of this behavior tremendously." The trial court stated that it did not have confidence that Lavender has "the tools at this point in time to get out there and handle all this stress and all these inclinations and obsessive behavior" and, therefore, Lavender "needs to have a period of incarceration, which is what the [S]tate has recommended, and a period of supervision." The trial court explained:

The incarceration gives you time to work on those dual diagnosis issues ... that you need to build your confidence and ability to be law abiding when you come back. And then you need to be in the community supervised closely to maintain your behavior to the standards of the community....

For those reasons the court is going to ... issue a sentence which will have an initial period of confinement of 18 months with credit of 158 days, and then a supervision period of two years on your extended supervision.

¶10 Lavender filed a postconviction motion for resentencing in which he argued, as relevant to this appeal, that the trial court erroneously exercised its sentencing discretion because it did not consider probation as the first alternative sentence, adequately explain the sentence, or explain why the maximum sentence was necessary. The trial court denied the motion in a written order.³ The trial court's order did not offer any additional explanation of its sentence. This appeal follows.

DISCUSSION

¶11 Lavender challenges his sentence. Our standard of review is well-settled and places a heavy burden on a convicted defendant. Sentencing lies within the trial court's discretion, and appellate review is limited to considering whether discretion was erroneously exercised. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Sentencing decisions “are generally afforded a strong presumption of reasonability because the [trial] court is best suited to consider the relevant factors and demeanor of the convicted defendant.” *Id.*, ¶18 (citation omitted).

³ The trial court also rejected Lavender's argument that the State breached the plea agreement when it mistakenly told the trial court at sentencing that the second count was dismissed and read in, rather than simply dismissed. Lavender has not appealed the trial court's rejection of that argument and we do not discuss it further. Finally, we note that the trial court granted Lavender's motion to vacate the DNA surcharge.

¶12 In *Gallion*, our supreme court stated that trial courts must “explain the reasons for the particular sentence they impose” and “provide a ‘rational and explainable basis’ for the sentence.” *Id.*, ¶39 (citation omitted). Specifically, a court must address three things during its sentencing remarks. First, the court must “specify the objectives of the sentence on the record.” *Id.*, ¶40. Proper sentencing objectives include “the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *Id.* Second, the court must “describe the facts relevant to these objectives.” *Id.*, ¶42. Third, the court must “identify the factors that were considered in arriving at the sentence.” *Id.*, ¶43. The primary factors the court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court may also consider additional factors. *See id.*

¶13 Applying those standards here, Lavender does not dispute that the trial court considered proper sentencing factors. What Lavender takes issue with is the trial court’s explanation of its sentence. He argues that the trial court’s “sentencing rationale was inadequate because it failed to explain why the maximum sentence was required” and the trial court “did not set forth its ‘process of reasoning’ for imposing this specific sentence.” He continues: “[T]here is simply not a clearly articulated explanation on the record of the link between the facts, factors, sentencing objectives and how *specifically* each of the components of the sentence promote the sentencing goals.” Lavender also complains that the trial court failed to “explicitly consider probation as the first alternative.”

¶14 We are not convinced that the trial court failed to adequately explain its sentence. First, we consider Lavender’s argument that the trial court was required to “*explicitly* consider probation as the first alternative.” (Emphasis

added.) *Gallion* states: “[Trial] courts should consider probation as the first alternative. Probation should be the disposition unless: confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement, or it would unduly depreciate the seriousness of the offense.” *Id.*, 270 Wis. 2d 535, ¶44. We agree with the State that the trial court’s “consideration of probation is implicit from its rejection of a time-served disposition, and its conclusion that incarceration was needed to rehabilitate Lavender and punish him for his crime.” Specifically, the trial court noted that Lavender “need[s] some more tools” to cope with his stress and obsessive behavior and found that a period of incarceration was necessary to assist Lavender. The trial court did not need to explicitly state that it was rejecting probation when the trial court’s remarks indicate that the trial court considered and ultimately rejected alternatives less severe than incarceration, including probation and a time-served disposition. *See id.*, ¶49 (rejecting notion that trial court is required to use “magic words”).

¶15 Next, we consider Lavender’s argument that the trial court “was remiss in failing to explain why the maximum sentence was necessary to achieve its sentencing objectives of rehabilitation, punishment, and deterrence.” Lavender faults the trial court for not acknowledging that it was imposing the maximum sentence or “declar[ing] that Mr. Lavender’s conduct was one of the most aggravated breaches of the statute.” Lavender also complains that the trial court did not adequately weigh his short criminal history and his efforts at rehabilitation, including meeting with a social worker and attending Alcoholics Anonymous meetings.

¶16 The State responds:

Lavender has not shown any error. *Gallion* does not require a court to use any specific language in issuing a

sentence.... [The trial court's] reasoning is plain from the record. The court issued the sentence it did because it concluded the severity of Lavender's conduct and his rehabilitative needs required it.

Additionally, while the court did not specifically hold that Lavender's stalking was among the most aggravated violations of the stalking statute, this too is implicit in the court's decision, particularly its comment that Lavender could have been charged with "dozens" of crimes for what he did. Finally, Lavender's claim the court did not properly consider his rehabilitation attempts or his criminal record also does not show error. The court weighed these factors, just not in the way Lavender wanted it to.

(Record and case citations omitted.) We agree with the State's reasoning. The trial court recognized the severity of Lavender's conduct when it referred to his stalking as "really, really scary, dangerous, and completely criminal behavior." The trial court explained why it believed that Lavender needed a period of incarceration to pursue treatment and as punishment. The trial court recognized—on the record in response to trial counsel's question—that given Lavender's five-month sentence credit, Lavender would be serving thirteen months in initial confinement. We are unconvinced that the trial court erred by not explaining precisely why it chose to impose a total of eighteen months of initial confinement rather than twelve months or some other period of time. *See id.* ("We are mindful that the exercise of discretion does not lend itself to mathematical precision.... As a result, we do not expect [trial] courts to explain, for instance, the difference between sentences of 15 and 17 years.").

¶17 In summary, we conclude that the trial court's sentencing explanation was adequate and that the trial court properly exercised its sentencing discretion. Lavender is not entitled to resentencing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

